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HAROLD B. WILLEY,

BRIEF ON MERITS.
No. 125.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

WAYNE HARSH,
Petitioner,

vs.

ILLINOIS TERMINAL RAILROAD COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of Illinois.

BRIEF FOR THE PETITIONER.

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OPINIONS BELOW.

The opinion of the Appellate Court for the Fourth District of Illinois is found in 351 Ill. App. 304, 114 N. E. (2d) 901. Following the opinion of the said Appellate Court petitioner, pursuant to Rule 75 (2c) of the Civil Practice

Act of Illinois [Illinois Revised Statutes 1953, Chapter 110, Section 199 (2c)] struck the remanding portion of the Appellate Court's decision, thereby making same final and reviewable by leave to appeal to the Illinois Supreme Court (R. 68).

The Supreme Court of Illinois denied petitioner's leave to appeal (thereby making the judgment final by the highest Court of Illinois) without written opinion (R. 69).

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on March 10, 1954 (R. 69). The jurisdiction of this Court is invoked under 28 U. S. C. A., Para. 1257 (3). The petition was filed June 7, 1954, and was granted October 14, 1954.

This action was brought pursuant to Title 45, Section 23, same being a portion of what is commonly known as the "Safety Appliance Act," being a companion act to the Federal Employers' Liability Act. Plaintiff's complaint was instituted charging the defendant specifically with violating the foregoing section of the Code (R. 23). There is no issue as to the applicability of the act, and the Appellate Court of Illinois for the Fourth District decided this action conceding that it was governed by the provision of the Safety Appliance Act (R. 17).

THE STATUTE INVOLVED.

This suit was initiated under the provisions of the Safety Appliances and Equipment Act (U. S. C., Title 45, Secs. 1 through 50), which in conjunction with the Federal Employers' Liability Act (Title 45, U. S. C., Sec. 51 et seq.) will be hereinafter referred to as the act. There is no issue raised as to the act being applicable to the case at bar.

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Section 23 of this act, which is relative to this case, reads as follows:

> "Use of unsafe locomotives and appurtenances unlawful—Inspection and tests.—It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act (§§ 22-29, 31-34 of this title) and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for (Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; June 7, 1924, c. 355, § 2, 43 Stat. 659)."

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the State or Federal law governs the right of a State Appellate Court to set aside a jury's verdict in an action under the "Safety Appliance Act" (45 U. S. C. A., Secs. ..... et seq.), as being contrary to the manifest weight of the evidence?

2. Which prevails in the event of conflict, a state statute affecting substantive rights of litigants under the acts or the rules of law as announced by the federal courts?

3. Whether if one concedes the right of the State Appellate Court to weigh the evidence and to hold a case against the manifest weight of the evidence, it was warranted in doing so in the case at bar?

STATEMENT OF THE CASE.

On April 25, 1950, petitioner Harsh was a conductor on an interurban electric car operated by defendant between St. Louis, Missouri, and Alton, Illinois (R. 30). On the date in question he was working on a three-car train of defendant, which left Alton, Illinois, at 7:00 A. M. and arrived in the tunnel of defendant's depot in St. Louis about 7:50 A. M. (R. 30).

Upon arriving in the tunnel petitioner got off the car so as to set the switch and permit the train to go in on Track Three, the proper one for it (R. 31). While proceeding to cross the switch one of the two trolley poles which were supplying electricity to the cars jumped the wire, failing to proceed onto Track Three. One of petitioner's co-employees got off the car, pulled the pole down and placed it under the safety hook (R. 31).

As the train then proceeded on, the trolley pole on petitioner's car jumped the track and he got off of his car to reset the pole and was in a position between the first and second car (R. 31).

On each car near the center there is a retriever. It is situated about five and one-half feet from the level of the ground (R. 31). The retriever is attached by a rope to the trolley pole. When the trolley jumps the wire there is a sudden pulling out of this rope, which causes the retriever to operate and to wind the rope onto the retriever, thus lowering the trolley pole so that it will not strike across wires or interfere with the continued passage of the car. The specific interworkings of the retriever are detailed by petitioner's mechanical engineer (R. 48 through 52).

After the trolley has jumped the wire and the retriever has retrieved the trolley pole it is necessary to reset the retriever (R. 32). When the retriever has become wound

after a sufficient amount of winding, it locks and becomes set and the tension of the rope is gone and the rope can be played freely back and forth on the retriever (R. 32). After the retriever has been rewound it can be set again on the pole by a slow releasing of the rope and permitting a gradual ascension of the trolley pole to the line (R. 32). If the trolley were slowly permitted to ascend, then it is agreed that the retriever, if properly operating, should not retrieve (R. 49).

Petitioner on the instance in question first pulled out the rope to rewind the retriever (R. 32). While resetting the trolley pole, and while permitting the rope to be played out in a slow manner, because of a defect in the retriever, the retriever suddenly operated, pulled petitioner between the two cars, severely injuring petitioner's back (R. 32). Petitioner stated that when the retriever pulled him it was as if he had been struck by something, and it immediately occasioned a terrible pain down his head and back (R. 32).

Unable, because of his pain, to reset the retriever on the pole in question, petitioner set the pole on the car behind (R. 32).

This pole was setting the opposite direction for the then forward motion of the car, and the car was backed into the tunnel against the pole, a situation used only in case of emergency (R. 32).

Petitioner was corroborated by defendant's witness Elder regarding the fact that the retriever was pulled out by him and that rather than placing that trolley on the line, which was the normal thing to do, he hooked it on the hook and set the pole on the other car (R. 57-59).

Unable to aid in the discharge of his passengers as was his usual custom, Harsh rode dead-head back to Granite City with his crewmen (R. 33). While returning with the crewmen he told two of them of his injury (R. 33).

These employees testified for the Company at the trial and denied Harsh had told them about the injury.

Harsh stated his pain subsided somewhat, and that after he returned to the yards in Granite City, he went to his home (R. 33). He was too ill to eat his breakfast and lay in bed for a short while (R. 33). Having made previous arrangements to assist in a roofing job in Wood River, he drove to Wood River (R. 33). While at the home of his friend and co-employee, Phillips, he called his wife and directed her to report him off work because he felt ill (R. 33). He was to go back to work at 2:10 in the afternoon for the second part of his split shift (R. 33).

Returning home about two in the afternoon, he stated his back was hurting more and more as time went on (R. 34). That afternoon he reported to defendant's dispatcher, Quigley, that he was injured on the morning run and received a slip for the hospital and doctor (R. 35).

He went to Dr. Grzesk, whom he believed to be a company doctor. The doctor examined him, gave him a hypodermic, and sent him home to bed (R. 35).

He didn't return to work until the following Sunday, being in great pain during this period (R. 35).

When able, some three days after his injury, on April 28, 1950, he went to the defendant's office and made a report of his injury, which was placed in evidence as Petitioner's Exhibit I. This report corroborates petitioner's version of his injury precisely as he testified at the trial. He noted in this report that the retriever was defective and that its sudden retrieving had drawn him in over the drawbar and injured him.

Petitioner was referred by defendant to several other local doctors who examined him but did not testify in the case. He was finally ordered by Company Doctor Hamm on May 19, 1950, to Missouri Pacific Hospital (R. 36).

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He was admitted there as a service employee, with a service injury, and his admission was approved by the general superintendent of defendant company (R. 36). This was marked on his entry card (R. 36). He remained there until the 30th, being examined by various doctors but receiving little relief (R. 36).

He continued to treat with Dr. Grzesk of Granite City and was doing so until the time of the trial (R. 37).

During the intervening time, he has been wearing a canvas belt on his back for support and at times his pain would be alleviated, other times he was severely affected by pain and was unable to pick up or move things, even his baby. This was his condition at the time of the trial on September 19, 1951 (R. 37).

Petitioner testified to specific days of loss of work amounting to over $600.00 and in addition testified there were periodical times when he was unable to work (R. 37, 38). Although he had no complete record of his actual time lost, he also testified that he would sometimes go in the morning, work only two or three hours, and then have to be relieved because of his sickness and hurting (R. 42).

Paul Kline, a graduate mechanical engineer from Missouri School of Mines, employed at the time as a research engineer for American Steel Foundries, testified for petitioner (R. 48). On two occasions he had examined, and on one occasion disassembled, a retriever. The retriever in question was one belonging to defendant which petitioner had borrowed for the purpose of examination (R. 48). The defendant used only one type of retriever (R. 57). This retriever examined by Kline was shown to be the same type as was on the car when petitioner was injured (R. 38).

Kline described the interworkings of the retriever in detail and explained how it operated (R. 49). He specifically stated that if the retriever recoiled when there

was a slow letting out of the rope, that the retriever was defective and was not operating properly (R. 49, 51). This he explained could occur as a result of several possible defects in the retriever which would affect the operation of the paw mechanism (R. 52). These defects could be either from a wearing of the teeth at certain points which would cause slippage and result in unexpected retrieving or there could be defects in any of the several small springs which could cause the retriever to act without warning (R. 52).

Defendant's witness Elder, who weighed 190 pounds, admitted that the retriever when tripped pulled with such force as to pull him into the car before he could let go (R. 55).

Defendant's witnesses neither produced the retriever or accounted for its absence. Nor did defendant adduce any evidence concerning its condition at the time of the incident (R. 18).

The employees of defendants, who were crewmen on the car, testified, but they failed to witness the actual occurrence and their testimony was primarily directed towards denying that petitioner had informed them of the occurrence (R. 55 through 63).

The jury found in favor of petitioner and awarded him a verdict of Twelve Thousand Dollars ($12,000.00), and the trial Court, after denying defendant's motions for new trial and for judgment notwithstanding the verdict, entered judgment on the verdict in favor of petitioner (R. 15). Defendant appealed to the Appellate Court for the Fourth District.

The Appellate Court held that petitioner had made a jury question, but that the verdict of the jury was against the manifest weight of the evidence, and reversed and remanded the cause for a new trial (R. 15 through 21).

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On petitioner's petition for rehearing, setting up the fact that the Appellate Court was without authority, under the governing Federal rules of law, to hold the verdict against the manifest weight of evidence, the Court wrote an additional opinion specifically denying the petition and relied upon its "historical power to reverse and remand a case for new trial when it believes the verdict to be against the manifest weight of the evidence" for so doing (R. 21, 22).

Petitioner, then, pursuant to Rule 75 (2c) of the Illinois Civil Practice Act [Chapter 110, Section 199 (2c), Ill. Revised St. 1953], struck the new trial and remanding clause of the Appellate Court's judgment, thus making it final, and sought from the Supreme Court of Illinois the right of leave to appeal from such final judgment, again raising the question of the right of the Appellate Court, under the governing Federal authority, to hold petitioner's verdict to be against the manifest weight of the evidence (R. 1-15).

The Illinois Supreme Court denied petitioner's leave to appeal without opinion and petitioner sought certiorari to review the final judgment of the Supreme Court.

On October 14, 1954, this Court granted petitioner's request and ordered the writ granted (R. 69).

SUMMARY OF ARGUMENT.

The appellate court of Illinois exceeded its function o review when it, contrary to the controlling federal law weighed the evidence and substituted its opinion for tha of the jury in holding the present cause against the mani fest weight of the evidence.

Further the appellate court applied its own statutory state law granting it the right to weigh the evidence i preference to the law of the federal decisions which con trol and which forbade an appellate court exercising such a function once it had determined a submissible case existed. In the foregoing the lower court is guilty of transgressing its duty to apply federal law to federal statu tory actions in state courts and to permit its judgment to stand can only result in a voluminous mass of inconsistent holding in the various states without the determinative and supervisory restrictions of federal law.

This will result in many instances, as in the case at bar, in the deprivation of the employee's vested statutory right to trial by jury and will permit certain reactionary state courts to be just what they wish to be, the trier of the facts as well as the law.

Further, if the appellate court had a right to weigh the evidence and substitute its opinion for the jury's (a point conceded for the purpose of argument only) it erroneously assumed facts not shown by the record and made infer ences not properly deducible in order to deprive petitioner of his verdict. In other words, it searched the record in order to conclude differently from the result reached by the triers of fact and did this in contravention of the fed eral law which precludes this.

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ARGUMENT.

I.

In State Courts the Federal Holdings Are Controlling.

In actions under the Safety Appliance Act the holdings of the United States Courts are controlling and not those of the local courts of the various states.

Bailey v. Central Vermont Ry. Co., 319 U. S. 350, at 352;

Ellis v. Union Pacific Ry., 239 U. S. 649, at 653.

In Bailey v. Central Vermont Railway, 319 U. S. 350, this Court at page 352 said:

> "Section 1 of the Act makes the carrier liable in damages for any injuries or death resulting in whole or part from the negligence of any of its officers, agents or employees.
>
> "The rights which the Act creates are Federal rights protected by Federal rather than local rules of law (citing authorities)."

In Ellis v. Union Pacific Railroad, 329 U. S. 649, at page 653, in regard to the standard of negligence liability in cases under the Act, the Court said:

> "Whether those standards are satisfied is a Federal question, the rights created being Federal rights (citing authorities)."

II.

The State Court Had No Authority to Weigh the Evidence and Hold the Verdict to Be Against the Manifest Weight of the Evidence.

The first issue involved in the present case is whether the various state courts are at liberty to adjudicate in their

own way the rights of litigants under the Federal Employer and Safety Appliance cases in a manner contrary to the adjudication of such cases in a Federal Court.

Although Congress specifically permits the institution of cases under these acts in the state courts, it certainly cannot be inferred that it intended these courts adjudicate substantive rights under these federal statutes in a manner such as to prejudice litigants thereby.

Furthermore, to permit each state court to formulate its own rules and use its own substantive procedures in adjudicating these cases is simply to permit chaos to reign in the interpretation of the acts. This would inevitably result in not one pattern for these cases but for forty-nine, that is, one federal rule and one for each of the states.

In essence this is what the present decision will eventually develop if permitted to stand.

The Appellate Court of Illinois which decided the case at bar held this, in substance: Plaintiff had presented a submissible case for the jury on the question of defendant's negligence (R. 18); that the court's historical power to reverse a case as being against the manifest weight of the evidence [a statute, para. 216 (3b) of Chapter 110, Ill. Revised Statutes 1953, specifically grants the court such power]; that the court could thereby weigh the evidence and substitute its opinion for the jury's; that when it weighed the evidence and did substitute its opinion it felt the verdict for plaintiff was against the manifest weight of the evidence in regard to the defect alleged to exist; that it thereby could reverse and remand the cause.

The first question requiring determination is, was the Illinois court acting within its prerogative in its foregoing actions, keeping in mind the fact that on substantive matters, as we have seen, the Federal Court's construction of the acts is controlling?

It is petitioner's contention that it was not. This contention is based on logic as well as authority.

For, if a state court may set up its own standards for measuring the necessary evidence in order to recover in actions under the act, then the uniformity intended by Congress and the supervision vested in this Court over such situations is vapid.

The Federal Courts and most of the state courts in construing actions under the acts (when the word "acts" is used herein it contemplates the so-called Federal Employer and Safety Appliance Acts, Chapter 45, U. S. C. A. 1 et seq.) have appreciated that special consideration should be given to the legislative intent in enacting the statutes in question.

Railroad work is generally of a hazardous nature. Likelihood of injury to employees is greater than that of most employment. Congress certainly intended that some of the obstacles to recovery in common law actions should not be arbitrarily applied in these cases and hence the statutes and their provisions abolishing the harshness of the common law rule of fellow servant and contributory negligence as bars to recovery.

The Federal Courts and this Honorable Court have generally intelligently appreciated this situation and have strived to give affect to this known legislative intent.

Unfortunately state courts have failed in some instances to realize their position in the administration of these cases. They fail to discern that actually in handling actions under the acts they are sitting as federal courts and should be governed by federal rules of law construing these cases.

Although the specific injunctions of the act in forbading the application of the fellow servant and contributory negligence doctrines are too plain to warrant an attempt

to apply them in such cases, some courts nevertheless, and particularly so when the courts are reactionary and conservative, still attempt in other ways to invade the jury's province of deciding the factual issues. This they do under the guise of "against the manifest evidence" or by holding that there is an entire insufficiency of evidence to have warranted submission of the cause to the trier of facts.

In this manner they succeed in many instances in depriving employees of their just compensation.

In states where the courts are accustomed to a conservative approach in all cases it is much more difficult for them to give these cases the liberal construction intended.

This court is well aware of this existing situation and is no doubt much more familiar with it than the writer.

This court has repeatedly held that the right to trial by jury is "part and parcel of the acts" that to interfere with this is simply to deprive a litigant of his rights under them.

Here the appellate court of Illinois said that plaintiff had made a submissible jury case but that when it weighed the evidence, in its opinion, the jury's verdict was error, in that, the verdict was against the manifest weight of the evidence in regard to the existence of an alleged defect in the appliance in question (Rec. 18 through 21).

In weighing this evidence and in substituting its opinion for the jury's, the authorities hold the appellate court exceeded its function and thereby was in error.

In Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, at page 35, this Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order

to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. **It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.** Washington & G. R. Co. v. McDade, 135 U. S. 554, 571, 572, 34 L. ed. 235, 241, 242, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., supra (318 U. S. 68, 87 L. ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); Bailey v. Central Vermont R. Co., 319 U. S. 350, 353, 354, 87 L. ed. 1444, 1447, 1448, 63 S. Ct. 1062. **That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.**"

Likewise in Ellis v. Union Pacific Railroad, 329 U. S. 649, at page 653, the Court said:

"The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted facts, are questions for the jury. Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 88 L. ed. 520, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647; Lavender v. Kurn, 327 U. S. 645, 90 L. ed. 916, 66 S. Ct. 740, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might

reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra (327 U. S., p. 652, 90 L. ed. 922, 66 S. Ct. 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 34 L. ed. 235, 241, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, 87 L. ed. 610, 618, 63 S. Ct. 444, 143 A. L. R. 967.

"We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned.

"Reversed."

Also in Lavender v. Kurn, Trustee of St. Louis-San Francisco Railroad Co. etc., 327 U. S. 645, at page 652, the Court said:

> **"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."** (Emphasis ours.)

Many lesser federal and state courts have repeated this rule and in instances specifically denied the reviewing court the right to hold a case against the manifest weight of the evidence.

The case of Henwood, Trustee of St. L. Southwestern Ry. Co. v. Chaney, 156 Fed. 2d 392, at 398, the Court said:

> "The appellant in its brief presents argument relating to **inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision.** Tennant, Adm'x v.

Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520." (Emphasis ours.)

In this regard the cases of Grand Trunk & W. Ry. Co. v. Heatlie, 48 Fed. 2d 759, at 761, and Chapman v. Alton Ry. Co., 117 Fed. 2d 669, at 672, are also in point.

Likewise, in more lucid perspective, the very Court which decided the case at bar has followed this rule, although it refused to do so in the instant case.

In Grosse v. Terminal R. Ass'n of St. Louis, 307 Ill. App. 414, 29 N. E. 2d 1018, wherein at page 1022 of the Northeastern Reporter this very Court said:

> **"The federal courts have held that the fact that the verdict and judgment are against the weight of the evidence are not for the determination of an appellate court."** (Citing authority.) (Emphasis ours.)

This was also the holding in another case by this same Court in Nickell v. Baltimore & O. R. Co., 106 N. E. 2d 738, at 741, 347 Ill. App. 202.

In deciding contrary to this rule it had previously recognized, the Appellate Court in the case at bar cited only one case, that of Robertson v. L. & N. R. Ry. Co., 327 Ill. App. 44, 63 N. E. 2d 608, as its sole authority for so holding. This case had been decided earlier by this same Court. No Federal authority was given in the original decision nor in the supplemental opinion filed in denying the petitioner's petition for rehearing (R. 18-21-22).

The Appellate Court failed here to discharge its duty to follow the federal law governing this cause and for this reason and the further reason that uniformity is required this Court should reverse this cause.

III.

Where a Conflict Exists Between the State Law and the Federal Law the Latter Prevails.

No justification can be found in the Appellate Court's reasoning that because the statutory procedural law of Illinois permits it to weigh the evidence on review, this statute [para. 216 (3) (b), Chapt. 110, Illinois Revised Statutes 1953] is controlling in cases under the act and is superior to federal case law.

Although the state statute in question may be procedural in form and aspect, actually it is substantive in effect and as such cannot prevail over the law of the federal courts construing the acts.

In the case of Atlantic Coast Lines, etc., v. Mims, 37 Sup. Ct. 188, at 190, this Court recognized this rule.

In Chicago, Milwaukee & St. Paul Railway Co. v. Coogan, 70 L. Ed. 1041, at 1044, 271 U. S. 473, this Court in speaking of the negligence required to prove a case under the act said:

> "The **kind** or **amount** of evidence required to establish it is not subject to the control of the states."

Again in South Buffalo Ry. Co. v. Ahern, 344 U. S. 367, 97 L. Ed. 395, at page 401 of the Lawyers' Edition, this Court said:

> "We do not doubt that the Federal Employers' Liability Act, supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules, displaces any state law trenching on the province of the act. State Legislatures, for example, may not intrude into the federal act interstate commerce perimeter to destroy uniformity by arbitrarily presuming the renunciation of rights which the act confers."

Other holdings of a like nature are found in Buffo v. Baltimore & O. R. Co., 304 Pa. 437, 72 A. 2d 593, at 593; Whitmarsh v. Pa. R. Co., 61 Federal Supp. 850, at 852; Davis v. Midland Valley Ry. Co., 153 Pac. 2d 823, at 824.

This Court in Dice v. Akron C. & Y. R. Co., 96 L. Ed. 398, 342 U. S. 359, at 361, very succinctly stated the evident reason behind these holdings, saying:

> "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were entitled to have the final say as to what defenses could and could not be interposed by suits under the act."

The Appellate Court here failed to recognize this rule, rather it used its own state rule to deprive petitioner of his sacred right to a jury determination of the admitted factual issues.

To permit the decision to stand would be a repudiation of all the former holdings of this Court to the effect that federal standards and rules of law apply. It could serve only to add emphasis and support to the pseudo contention and desire of reactionary state courts to be the trier of the facts as well as the law. To permit this condition to result is to truly deprive the work of the most substantial remedy afforded by the act, that is the right to trial by jury. Whether or not one agrees that jury trial is the proper mode or procedure or would prefer some administrative bureau should handle these cases is not here the concern. Congress has specified the present system and until changed by it the courts have no discretion but to follow the congressional enactment.

This Court has many times appreciated this circumstance and its difficulty has been in securing proper cooperation from the state courts in this regard.

The supervisory capacity of this Court in cases instituted under federal statutes in state courts requires a constant circumspection of the rights afforded litigants in such courts. When, as here, these federal rights are not protected it is the duty of this Court to rectify the error by reversing such state court. Only in this fashion can any clarity of law result, and only in this latter event can a litigant in Texas receive the same trial and adjudication that one in West Virginia receives in state court actions involving federal rights.

The foregoing reasons provide ample logic and authority for this Court's reversing the present judgment.

IV.

The Appellate Court Searched the Record in Order to Find a Conflict and Thereby Substituted Its Opinion for That of the Trier of Facts.

However, since it is apparent that even if the Court here had the authority to weigh the evidence and to hold the verdict against the manifest weight of the evidence (which is conceded only for argument), it acted erroneously in so doing.

First, it must be remembered that the Federal Courts including this Honorable Court have frequently reiterated, in cases under the acts, that the Appellate Court cannot search the record to find some conflicting version of the incident, nor can it draw contrary inferences once an evidentiary basis has been established for the jury's verdict. Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, at 35—(quotations to this effect have been previously noted, and therefore are not repeated, for the sake of brevity).

The Court held this action against the manifest weight of the evidence, on the assertion that the evidence regard-

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ing the defect in the retriever was such that if plaintiff's expert's testimony were taken as true the retriever would not operate normally, and that the evidence showed it did operate properly after the incident (R. 18).

This the Court held was irreconcilable and warranted a reversal.

In regard to the testimony regarding the expert witness, further note will be made later.

Regarding the normal operation of the retriever after the incident, the following was the evidence:

The sole basis for the Court's saying that the retriever "operated normally" after the incident was the statement of Harsh after the incident—at page 44 of the Record, he said this, about the retriever: "It doesn't necessarily have to be set when you place it under the hook. **I presume he reset it.** I saw him pull it out."

The retriever was never brought into court or its subsequent disposition by the company ever accounted for (R. 18). Nor did it offer any evidence as to its operating condition at the time of the incident (R. 18).

Plaintiff's statement, that the retriever was presumably reset and placed on the hook, was speculative, in so far as the presumption was concerned, and was in no way a positive statement that the retriever was operating normally. In fact, as we shall see when we analyze the testimony of petitioner's expert witness, the retriever could have been easily reset and still not have operated normally on every occasion.

None of the defendant's occurrence employees makes any statement about the fact that the retriever was reset, or that it was in any way used on the return trip. Their statements were simply that it was under the hook. (See R. 56, 60, 62.)

Nor do I believe this Court's construction of the statement of plaintiff's expert to the effect that the retriever would not operate normally at all is one that should necessarily follow.

This witness stated that in his opinion the defect causing the retriever's failure to operate properly was:

> "My opinion is that the paw mechanism would be some fault in the paw mechanism. **There would be several reasons why it would cause it not to work properly.** The main reason would probably be where the teeth would probably be worn to a point where it would slip this dog out, which would cause it to retrieve. There are several small springs involved in this that would cause it to retrieve without any warning" (R. 52).

In view of this witness' testimony concerning the interworkings of the machinery of the retriever (R. 49), it is very conceivable that, where an interlock was made with an unworn gear tooth of the retriever, the latter would properly operate, whereas, if the retriever were to be wound where it was set with one of the gear teeth which was worn, the retriever would not work properly, and this was apparently the situation when plaintiff was injured.

The statement by this witness, that the retriever would not work normally at all, was based on this final question on cross-examination which assumed that not just one but all the defects mentioned were present in the retriever: "' ' ' if the paw were worn and springs broken, would it work normally at all?" (R. 82.)

The witness' opinion as to the cause of the retriever's failure to work properly, as before noted, was based on several things that could have been wrong with the retriever, that is, that the paw mechanism was not working properly, or the teeth being worn caused slipping, or that

there were several small springs involved that could cause it to retrieve without warning. This witness did not specifically say which one of these caused the failure in the instant case, as he was in no position to know this, and defendant did not produce the retriever. His statement, that it would not work normally at all if both the paw and springs were broken, is probably correct, but does not pass upon the question whether it would work normally at all, if just one of these things were defective.

So we can see that the reasons adduced by the Court for holding the verdict against the manifest weight of the evidence will not stand circumspection.

The Court first reasons that because petitioner stated he presumed the retriever was reset it was "operating normally." This inference is certainly a presumed one under the evidence, and when the Court then attempts to parlay this, with the expert's alleged opinion, that this would be impossible, the Court's reasoning becomes untenable, for we have seen that the expert's testimony is not reasonably subject to such a construction.

We believe it is apparent that the Court, in the instant case, has erroneously weighed the evidence, if it should be found that it ever had such a right. This latter action, in itself, would be sufficient for this Court in the exercise of its supervisory powers to reverse this cause.

CONCLUSION.

Wherefore, petitioner respectfully prays that the judgment of the Supreme Court of Illinois be reversed, and for such other relief as to this Court may seem proper.

WAYNE HARSH,
Petitioner.

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